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## IS THERE ANYTHING FAIR ABOUT FAIR USE? EDUTAINMENT'S PLACE IN THE COURTS

Heather B. Siegelheim, Esq.\*

### I. INTRODUCTION

No one would deny that children today live in a very different world than generations past. The advent of interactive television, video games, computers, and technology has drastically altered the way children view the world, and, it follows, the way they process information and learn. In fact, young children are now teaching their parents everything from how to text message, to how to use the computer (either more effectively or at all), and, in some cases, how to play video games. Children today not only watch television and listen to music; they also make television and music.

Children today have the potential to be content creators, and not because they are any smarter than children of previous generations (although some argue that our culture is, in fact, getting smarter<sup>1</sup>), but because they have the means to accomplish their ends. “Edutainment,”<sup>2</sup> which refers to the convergence of education and entertainment,<sup>3</sup> is increasingly becoming a primary medium in which our children learn. Through educational technology, children are able to learn and express themselves in new ways.

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1. See generally STEVEN JOHNSON, EVERYTHING BAD IS GOOD FOR YOU: HOW TODAY'S POPULAR CULTURE IS ACTUALLY MAKING US SMARTER (2005).

2. Robert Heyman is credited with having popularized the term “edutainment” while producing films for the National Geographic Society. Wikipedia, *Edutainment*, [http://en.wikipedia.org/wiki/Edutainment#cite\\_note-0](http://en.wikipedia.org/wiki/Edutainment#cite_note-0) (“The noun edutainment is a neologistic portmanteau used by Robert Heyman in 1973 while producing documentaries for the National Geographic Society.”). However, some sources credit the Walt Disney company with using the term as early as 1948. *Id.* (last visited Feb. 28, 2010).

3. Dictionary.com, *Edutainment*, <http://dictionary.reference.com/search?q=edutainment> (last visited Feb. 28, 2010).

More particularly, children now, more than ever, have more opportunities for creative learning and expression. When children learn in a creative way, it incites them to be creative themselves. But despite the fact that our children are increasingly provided with the technological tools to promote and foster their creativity, our copyright laws are ill-equipped to deal with today's digital technology and means for creative expression.

Edutainment, though extremely popular in homes, is not yet pervasive in schools; however, when edutainment inevitably does converge with copyright laws in schools, one side will emerge the victor. Under the current legal system, most of our children's creative work—that is, content created from copyrighted material and remixed for a new and different purpose—will probably be presumptively illegal.<sup>4</sup> Copyright law is allegedly supposed to maintain a balance between promoting innovation and protecting content creators,<sup>5</sup> but several cases have held that, although the “immediate effect of our copyright law is to secure a fair return for an author's creative labor . . . the ultimate aim, is, by this incentive, to stimulate artistic creativity for the general public good.”<sup>6</sup> In practice, however, the laws are stifling innovation for the general public good.<sup>7</sup> According to John Seely Brown, the chief scientist at Xerox Corporation, “We are building a legal system that completely suppresses the natural tendencies of today's digital kids . . . We're building an architecture that unleashes 60 percent of the brain [and] a legal system that closes down that part of the brain.”<sup>8</sup>

This article argues that edutainment is critical to students' education today, and educators must have certain safeguards to

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4. LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY*, 185 (2004).

5. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

6. *Id.*; see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’” (citing U.S. CONST., art. I, §8, cl. 8)).

7. MATT MASON, *THE PIRATE'S DILEMMA: HOW YOUTH CULTURE IS REINVENTING CAPITALISM*, 142 (2008) (“Our nineteenth-century intellectual property laws suited the past, but they are not quite right for the future, and today they often stifle creativity rather than encourage it.”).

8. LESSIG, *FREE CULTURE*, *supra* note 4, at 47.

ensure that they are able to use such digital technology and media in the classroom comfortably, effectively, and, most importantly, legally. To this end, educators should be made more aware of the copyright laws and their rights and defenses against such laws, including fair use<sup>9</sup> and § 110 exemptions.<sup>10</sup> Nonetheless, these defenses are not adequate safeguards, because they do not cover all of the uses of copyrighted material that are likely to occur and should be encouraged in the classroom in today's digital culture. For that reason, this article argues that the courts should not solely rely on educators as a means to solve this problem. Rather, Congress should create additional exemptions for classroom instruction and create informational programs for teachers. These efforts will not only provide educators with a level of comfort when working with technology and digital media, but also help them understand copyright law, fair use, and what creative content they should—and should not—be promoting and using in the classroom.

## II. COPYRIGHT LAW

Copyright law has its foundation in the United States Constitution: the Copyright and Patent Clause empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>11</sup> Copyright law protects original works of authorship fixed in a tangible medium of expression.<sup>12</sup> As a reward for creating and contributing new content to the public, Congress grants authors a limited monopoly

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9. 17 U.S.C. § 107 (2006).

10. 17 U.S.C. § 110. Section 110 contains exemptions for certain performances and displays in nonprofit, educational settings. This includes face-to-face classroom instruction if the use of copyrighted material is used for instructional purposes, as well as digital transmissions of copyrighted material in accredited, nonprofit, educational and/or governmental settings if the copyrighted material is lawfully obtained, used at the direction of the instructor, its use is limited to what is necessary, and the material is directly related to the teaching content.

11. U.S. CONST. art. I, § 8, cl. 8.

12. 17 U.S.C. § 102(a).

for their copyrighted works. Pursuant to the 1976 Act<sup>13</sup> and subsequent amendments, the duration of copyright protection for works created on or after January 1, 1978 is now the life of the author plus seventy years.<sup>14</sup> The language “now known or later developed” explicitly provides room for future technologies. Consistent with the basic purposes of copyright law, copyright owners have an exclusive bundle of rights, which include the right to reproduce, prepare derivative works, distribute copies, perform the works publicly, display the works publicly, and perform work publicly by means of digital audio transmission in the case of sound recordings.<sup>15</sup>

But this generation is different than any other in the past. The world that we live in today is a “read-write culture” as opposed to a “read-only culture.”<sup>16</sup> The digital world is not comprised of people who sit around and watch content passively, but rather people who actively make content with technology. This has been what some have termed a “cut and paste” culture.<sup>17</sup> While this is great for creativity, the copyright law is ill-equipped to deal with today’s digital technology.

A perfect example of the way today’s children absorb and process information is illustrated in Lawrence Lessig’s *Free Culture*.<sup>18</sup> Lessig described the “Just Think! Project” in San Francisco, an initiative that allowed inner-city kids to tinker with technology and remix old technology to create new content.<sup>19</sup> The project’s executive director termed what these kids were doing as “media literacy,” which he defined as “the ability . . . to

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13. The Copyright Act of 1976 was enacted on October 19, 1976 and provides the basic framework for the current copyright law. *See generally* 17 U.S.C.A. §§ 101-1332 (West 2009).

14. This is assuming one author. If there are joint authors the term is 70 years after the death of the last living author. If a work is an anonymous or pseudonymous work, or a work made for hire, the duration of protection is 120 years from date of creation. 17 U.S.C. § 302.

15. 17 U.S.C. § 106.

16. LESSIG, *FREE CULTURE*, *supra* note 4, at 37 (referring to the “Read-Only” culture as “passive recipients of culture produced elsewhere.” “couch potatoes,” and “consumers”).

17. *Id.* at 105.

18. LESSIG, *FREE CULTURE*, *supra* note 4.

19. *Id.* at 35-36.

understand, analyze, and deconstruct media images.”<sup>20</sup> Today, the way students think and want to learn is changing along with the times, and academics and creativity proponents alike are viewing media literacy as “crucial to the next generation of culture.”<sup>21</sup> Unfortunately, instead of encouraging this form of literacy, copyright law’s current regulation structure is stifling children’s creativity.

### A. *The Fair Use Doctrine*

Copyright protection is not without its limits.<sup>22</sup> Courts have recognized that some unauthorized use of copyrighted material should be permitted if it is “fair.” The fair use doctrine allows a person to use unauthorized, copyrighted material in a reasonable manner.<sup>23</sup> Fair use is an equitable rule based upon the premise that “the financial reward guaranteed to the copyright holder is but an incident of [the] general objective [to promote the progress of science and useful arts], rather than an end in itself.”<sup>24</sup> As such, the copyright holder’s rights must, in some cases, be subordinate to the public’s right to the development of the arts and sciences.<sup>25</sup> In turn, if copyrighted material is used in a reasonable way, such that the benefit to the public outweighs the harm to the copyright owner, the use may be considered fair and, therefore, non-infringing.

The fair use doctrine was judicially created.<sup>26</sup> The seminal case was *Folsom v. Marsh*, where Justice Story, in 1841, recognized that a fair use is one that is “justifiable . . . such as the law recognizes [it] as no infringement of the copyright . . .”<sup>27</sup> In this case, the court held that a two-volume work on the life of George Washington, which took verbatim copies of Washington’s letters and other written documents from another collection, infringed the

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20. *Id.* at 36.

21. *Id.*

22. *Berlin v. E.C. Publs.*, 329 F.2d 541, 543 (2d Cir. 1964).

23. *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 780 F.Supp. 1292 (N.D. Cal. 1991) (citation omitted).

24. *Berlin*, 329 F.2d at 543-44.

25. *Id.* at 544.

26. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C. Mass. 1841) (No. 4901).

27. *Id.* at 348.

original copyright.<sup>28</sup> The court's concern was not that Washington's letters were used, but that the *entire letters* were taken verbatim,<sup>29</sup> with very little else added or altered to make it transformative.<sup>30</sup> While this particular use was not deemed "fair," Justice Story noted certain factors to consider in determining whether a use is a fair one, including: "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."<sup>31</sup> Even at this time, when fair use was not yet statutorily created, Justice Story recognized two important points: the use of copyrighted material is more likely to be considered "justifiable" if it is transformative;<sup>32</sup> and the factors are illustrative but not limitative.<sup>33</sup>

The fair use doctrine was statutorily recognized in the 1976 Act in 17 U.S.C. § 107. Though the language was altered a bit, Justice Story's factors, as originally articulated in *Folsom*, were mostly kept intact.<sup>34</sup> The preamble of § 107 provides examples of presumptively fair uses: "criticism, comment, new reporting, teaching, scholarship, and research;" however, this list is not exclusive, as the categories listed in the preamble are intended only as "general guidance about the sorts of copying that courts and Congress most commonly . . . [find] to be fair uses."<sup>35</sup>

As sanctioned in § 107, the four factors are as follows:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

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28. *Id.* at 345.

29. *Id.* at 349 (emphasis added).

30. *Id.* ("If it had been the case of a fair and bona fide abridgment of the work . . . it might have admitted of a very different consideration.").

31. *Id.* at 348.

32. *Folsom*, 9 F. Cas. at 345 ("There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.").

33. *Id.* at 348 ("Many mixed ingredients enter into the discussion of such questions.").

34. 17 U.S.C. § 107.

35. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994).

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>36</sup>

The statute makes clear that these factors are not to be treated in isolation, but rather are to be weighed together, in light of the general purposes of copyright law. This is consistent with the Court's pronouncement in *Campbell v. Acuff-Rose Music*, which made clear that the fair use doctrine is to be applied and analyzed on a case-by-case basis.<sup>37</sup> Indeed, it is a highly factual inquiry; there are four factors provided, as well as uses that are presumptively fair, but no clear answers. Nonetheless, in practice, courts rarely look outside of the four factors.

### *1. Purpose and Character of the Use*

The first factor, purpose and character of the use, primarily asks whether the use is of a commercial nature or for a nonprofit or educational purpose.<sup>38</sup> In general, the fact that a work is commercial as opposed to nonprofit weighs against a finding of fair use.<sup>39</sup> The crux of the distinction is not necessarily whether the use of content was for monetary gain, but whether the user is able to profit from its exploitation.<sup>40</sup> A person's conduct and intent

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36. 17 U.S.C. § 107.

37. *Acuff-Rose*, 510 U.S. at 578.

38. 17 U.S.C. § 107(1).

39. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) ("[Every] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.") (internal quotation marks and citation omitted); *See also Acuff-Rose*, 510 U.S. at 585.

40. *Harper & Row*, 471 U.S. at 562; *see also Acuff-Rose*, 510 U.S. at 584.



are also relevant.<sup>41</sup>

While mere commercial use of copyrighted material will generally cut against a finding of fair use, a court does not end its inquiry there. The court must then determine if the new work is transformative.<sup>42</sup> A work is transformative when the new content “does not merely supersede the objects of the original creation but rather adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>43</sup> A use can also be deemed transformative if it is made available for a new audience or for a different purpose.<sup>44</sup> The more transformative the work, the less significant are the other factors, including commercialism.<sup>45</sup>

## 2. Nature of the Copyrighted Work

The second factor, the nature of the copyrighted work, examines the value of the materials used.<sup>46</sup> This is based on the premise that some works deserve more protection than others. For this reason, creative works are generally given more protection than bare factual compilations, partly because “[t]he law generally recognize[s] a greater need to disseminate factual works than works of fiction or fantasy.”<sup>47</sup> That a work is unpublished also weighs against a finding of fair use.<sup>48</sup>

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41. *Harper & Row*, 471 U.S. at 562 (citing 3 NIMMER § 13.05[A], at 13-72); *See also* *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 475 (2d Cir. 2004).

42. *Calkins v. Playboy Enters. Int’l, Inc.*, 561 F.Supp. 2d 1136, 1141 (E.D. Cal. 2008).

43. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 720 (9th Cir. 2007) (citation and internal quotation marks omitted); *see also* *Wall Data, Inc. v. L.A. County Sheriff’s Dep’t.*, 447 F.3d 769, 778 (9th Cir. 2006) (“A use is considered transformative only where a defendant changes a plaintiff’s copyrighted work or uses the plaintiff’s copyrighted work in a different context such that the plaintiff’s work is transformed into a new creation.”).

44. *Ty, Inc. v. Publ’ns Int’l, Ltd.*, 333 F.Supp. 2d 705, 711 (N.D. Ill. 2004) (“[A] work is not considered transformative if it serves the same purpose as [the] original or derivative works.”).

45. *Acuff-Rose*, 510 U.S. at 579.

46. 17 U.S.C. § 107(2).

47. *Harper & Row*, 471 U.S. at 563.

48. *Id.* at 555 (explaining that the reason unpublished works are entitled to more protection is because of “[t]he obvious benefit to author and public alike

### *3. Amount and Substantiality of the Portion Used in Relation to the Work as a Whole*

The third factor, the amount and substantiality of the portion used in relation to the work as a whole, considers the quantity and quality of the portion taken. Generally, if an entire work is reproduced, it weighs against a finding of fair use.<sup>49</sup> But the extent of permissible copying varies depending on whether the use is for a nonprofit or commercial purpose.<sup>50</sup> Conversely, if only a portion of the work is used and reproduced, it can still weigh against a finding of fair use if the “heart” of the work was taken.<sup>51</sup> If an insignificant portion of the original work was used, that fact does not necessarily justify the infringement: “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”<sup>52</sup>

### *4. Effect of the Use on the Potential Market*

The fourth factor, the effect of the use on the potential market, examines not only the extent of market harm caused by the actions of the infringer, but also whether unrestricted and widespread

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of assuring authors the leisure to develop their ideas free from fear of expropriation” and the fact that “[t]he author’s control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as a valuable adjunct to publicity and marketing”); *see also Nintendo*, 780 F.Supp. at 1293; *see also Sony Computer Entm’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1028 (9th Cir. 2000).

49. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 450 (1984); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (“While wholesale copying does not preclude fair use per se, copying an entire work militates against a finding of fair use.”) (internal quotation marks and citation omitted).

50. *Kelly*, 336 F.3d at 820.

51. *Folsom*, 9 F. Cas. at 348:

It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient . . .

*Id.*

52. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936).

conduct of this sort would result in a substantially adverse impact on the *potential* market for the original copyrighted work.<sup>53</sup> A fair use cannot supplant the market demand for the original, but it can suppress the demand for the original. For example, a negative review of a book or a movie that contains quotations from the book or movie may cause a person to lose interest in that book or movie, but it does not serve as a replacement for the original in the market.<sup>54</sup>

If the first and fourth factors both weigh in favor of fair use, a court will probably find that the use is fair.<sup>55</sup> Conversely, if the first and fourth factors weigh against fair use, the court will probably find that the use is not fair.<sup>56</sup> Even though the factors are non-exclusive, courts rarely look outside of the four factors in practice.<sup>57</sup>

### *B. Fair Use and New Technology*

As Lawrence Lessig has famously said, fair use is “the right to hire a lawyer to fight for your right to create.”<sup>58</sup> The fair use doctrine is problematic for several reasons, including its flexible and amorphous nature, the emphasis of some factors over others, and lack of guidance in the way of examples other than those listed in § 107.<sup>59</sup> The potential for problematic application of the fair use doctrine might be best seen when new technologies are created. Because the fair use analysis is so flexible and is, for the most part, left for the court to determine, it is difficult to determine how a particular new technology will withstand the fair use factors.

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53. *Harper & Row*, 471 U.S. at 568 (emphasis added).

54. *Nintendo*, 780 F.Supp. at 1294.

55. Professor Scott Shagin, Lecture at Seton Hall Univ. School of Law (Fall 2008).

56. *Id.*

57. *Id.*

58. See KEMBREW MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY, 329 (2007) (explaining that an “exasperated Lawrence Lessig” bemoaned the doctrine of fair use at a panel on which they both sat for the Illegal Art show).

59. Jonathan Evan Goldberg, *Now That the Future Has Arrived, Maybe the Law Should Take a Look: Multimedia Technology and Its Interaction With the Fair Use Doctrine*, 44 AM. U.L. REV. 919, 942 (1995).

“As new technological developments have occurred, Congress has responded by fashioning new rules of copyright.”<sup>60</sup> But while courts have generally deferred to the legislature to expand copyright protections, “Congress cannot immediately respond to each invention that hits the market.”<sup>61</sup> Courts must therefore use their best judgment to apply copyright law to new technologies, consistent with Congressional intent.<sup>62</sup>

At this point, edutainment’s fair use fate remains to be seen, but edutainment educators may still be subject to liability for infringement. Indeed, presumptively fair uses have been found not to be fair uses, so it is plausible that educators may incur liability.<sup>63</sup> This article proposes that the doctrine of fair use, while favorable to nonprofit, educational uses in theory, is an insufficient legal basis for educators to rely upon. Although teachers must be made aware of fair use, Congress must protect educators by implementing more statutory exceptions to the copyright laws, and programs should be developed to help foster this awareness without constant resort to and reliance on the courts.

### III. EDUTAINMENT

#### *A. Introduction*

Edutainment combines entertainment with education and is quickly becoming a powerful educational tool for children.<sup>64</sup> To determine the positive impact that edutainment-based learning might have within our educational system, it is important to consider how it is already a helpful learning tool for children outside of school. In particular, video games, television, multimedia, and the Internet are changing the way our children learn.

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60. *Nintendo*, 780 F.Supp. at 1290.

61. *Id.*

62. *Id.*

63. See generally *Macmillan v. King*, 223 F. 862 (D. Mass. 1914); see also *Dr. Seuss Enters., LP v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997); see also *Harper & Row*, 471 U.S. at 539.

64. Goldberg, *supra* note 59, at 959.

Some modern-day examples of edutainment that are for personal use at home combine children's favorite characters from television shows, books and movies with subjects they learn in school. LeapFrog's Didj, for example, uses the slogan "The next step in learning fun!"<sup>65</sup> Mostly geared toward six to ten-year olds, the Didj is a portable gaming system that permits children to choose games with their favorite characters and customize their games and learning on the computer, which syncs with the Didj. If a child would like more reinforcement in English, Math, or Science, she can choose to have that subject tested more in the game. Parents may also use the computer to customize the games to reflect subjects they would like their children to improve upon and keep track of their children's progress.<sup>66</sup> The New York Times analogized the LeapFrog Didj to "vitamins mixed into a cupcake," as it is a "mix of things that are sweet and things that are good for you."<sup>67</sup> "Because the Didj looks more like a game machine than a learning toy, reticent young scholars may just play for hours, soaking up knowledge even as they slash light sabers and swing whips."<sup>68</sup> The Didj is just one example of edutainment. The Fisher-Price Computer Cool School<sup>69</sup> consists of a "kid-friendly keyboard [that] transforms your computer into a complete get-ready-for-school system."<sup>70</sup> The keyboard has five learning centers with skill-building activities in almost every subject taught in school, and, like the Didj, reinforces these skills with children's favorite television and movie characters.<sup>71</sup>

Author Steven Johnson suggests that we as a culture should rethink the value of video games and other digital media and understand that, while literary works are extremely valuable and

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65. LeapFrog Didj, <http://www.leapfrog.com/gaming/didj/> (last visited Feb. 28, 2010).

66. *Id.*

67. John Biggs, *Reinforcing Lessons from School, Slyly, Through Games*, NY TIMES, July 17, 2008, available at [http://www.nytimes.com/2008/07/17/technology/personaltech/17leap.html?\\_r=3&scp=1&sq=didj&st=cse&oref=slogin&oref=slogin&oref=slogin](http://www.nytimes.com/2008/07/17/technology/personaltech/17leap.html?_r=3&scp=1&sq=didj&st=cse&oref=slogin&oref=slogin&oref=slogin).

68. *Id.*

69. Fisher-Price, <http://www.fisher-price.com/fp.aspx?st=10&e=ccsmainproduct&pid=45206> (last visited Feb. 28, 2010).

70. *Id.*

71. *Id.*

important, video games are becoming more difficult and engaging *different* skills.<sup>72</sup> As Johnson explains, video games are becoming increasingly difficult, as they are more complex and involve more decision-making and analytical skills.<sup>73</sup> In making this observation, he ponders why children will endure the frustration and setback involved in video games and put in the time and effort for a game, when the same lesson in a classroom would send them running for the hills.<sup>74</sup> Johnson suggests that a possible reason for kids' willingness to learn from games is the ability of today's games to "tap into the brain's natural reward circuitry."<sup>75</sup> Complex games today, such as SimCity, have "reward architectures," and players want to seek rewards.<sup>76</sup> Johnson explains that "It's not *what* you're thinking about when you're playing a game, it's the *way* you're thinking that matters."<sup>77</sup> And, "far more than books or movies or music, games force you to make *decisions*."<sup>78</sup> There is also the "mental labor of managing . . . simultaneous objectives."<sup>79</sup> Simultaneous objectives are objectives within objectives, such as "in order to rescue the princess, one must get the key. In order to get the key, one must defeat the dragon," etc.<sup>80</sup> A child is essentially multi-tasking by engaging in these activities; instead of playing a game with only one objective, he or she is trying to accomplish several objectives at once. Johnson explains that, unlike board games with established rules, one only learns a video game's rules by playing, so children literally learn by playing.<sup>81</sup>

According to Mary Flanagan, a member of the Games for

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72. JOHNSON, *supra* note 1, at 17-23 (emphasis added).

73. *See generally id.*

74. *Id.* at 31-32 (recounting a personal anecdote of a trip he took with his nephew, he explains that he realized his nephew was actually learning from popular culture when he was playing the video game SimCity 2000 and stated that high tax rates in industrial areas would stifle development. If that same lesson were taught in his social studies class in school, he notes, his nephew would most likely not have absorbed it).

75. *Id.* at 34.

76. *Id.* at 37.

77. *Id.* at 40.

78. JOHNSON, *supra* note 1, at 41.

79. *Id.* at 54.

80. *Id.*

81. *Id.* at 42.

Learning Institute, video games can be utilized efficiently in middle schools to teach math and science.<sup>82</sup> When asked what quality games possess that have the potential to have profound effects on players' attitudes, Ms. Flanagan responded, "Games position the player in a place of choice."<sup>83</sup> Flanagan believes that a key strategy for expanding the market for educational games is to get the commercial-game market to incorporate educational aspects.<sup>84</sup> However, Ms. Flanagan does note that difficult hurdles remain: educators are largely unfamiliar with gaming systems, and educators will have to be equipped with the proper tools to be able to use and enjoy edutainment safely and efficiently.<sup>85</sup> As for the Internet, most activity conducted online is "participatory in nature,"<sup>86</sup> meaning users are actively, and not merely passively, engaged in what they are doing online. Steve Jobs, CEO of Apple, describes the difference between TV and the Web as "the difference between lean-back and sit-forward media."<sup>87</sup> This is comparable to Lessig's "Read-Write culture."<sup>88</sup>

Likewise, much of today's television contains "multiple threading," or multiple narrative threads, which often withhold critical information and contain layers of meaning to engage the mind more.<sup>89</sup> In the second part of his book, Johnson explores the correlation between rising IQ levels among society and rising TV ratings, describing this relationship as a "tendency toward complexity."<sup>90</sup> In the afterword of the book, Johnson answers critics who said he only looked to IQ scores, which are not always the best test of intelligence, by explaining that his research supports the idea that today's society is probably enhancing "system thinking," which is "analyzing a complex system with

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82. David Debolt, *How Video Games Can Help in the Classroom, and in the World*, CHRONICLE, Oct. 24, 2008, [http://chronicle.com/free/v55/i09/09a01202.htm?utm\\_source=at&utm\\_medium=en](http://chronicle.com/free/v55/i09/09a01202.htm?utm_source=at&utm_medium=en).

83. *Id.*

84. *Id.*

85. *Id.*

86. JOHNSON, *supra* note 1, at 118.

87. *Id.*

88. LESSIG, *FREE CULTURE*, *supra* note 4, at 37.

89. JOHNSON, *supra* note 1, at 118.

90. *Id.* at 156-7.

multiple interacting variables changing over time.”<sup>91</sup> “[T]he media ecosystem has been churning out popular culture that has grown steadily more complex over time.”<sup>92</sup> Overall, Johnson does not suggest that we stop reading and allow our kids to spend all day in front of the TV and play video games, but rather that “we . . . discard, once and for all, a number of easy assumptions we like to make about the state of modern society” and recognize that popular culture might not be so bad for us.<sup>93</sup> Television is not just television anymore, and video games are not just video games; media today encourages children to think, and the way children are thinking is not only critically, but creatively and digitally, as well.

Apple is one such company that has recognized the potential of creativity in content creation and learning, both of which today’s children need and at which they are talented. Apple’s advertisements for its Macintosh computers urge that consumers “do more than simply consume—rip, mix, burn, Apple instructs.”<sup>94</sup> Lawrence Lessig, author of *The Future of Ideas*, explains that Apple intends for consumers “to take what is our culture; to ‘rip’ it—meaning to copy it; to ‘mix’ it—meaning to reform it however the user wants; and most importantly, to ‘burn’ it—to publish it in a way that others can see and hear.”<sup>95</sup> This is an incredible revelation for children—to be told to take existing content, change it to make it their own, and then recreate it into something new. And it seems this call for creativity is working as children are more inventive than ever. As Sir Ken Robinson stated in a TED<sup>96</sup> Video entitled “Do Schools Kill Creativity?” children today have an incredible capacity for innovation: “creativity now is as important in education as literacy and we should treat them with

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91. *Id.* at 207.

92. *Id.* at 179.

93. *Id.* at 198.

94. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD*, 9 (2001).

95. *Id.*

96. TED is a nonprofit organization that holds conferences dedicated to “ideas worth spreading.” TED stands for technology, entertainment, and design—which represent the three realms from which people are brought together. TED, *About TED*, <http://www.ted.com/pages/view/id/5> (last visited Feb. 28, 2010).



the same status.”<sup>97</sup>

Technology is the means to the creativity end, as “[t]echnology is helping the D.I.Y. (do it yourself) mentality realize its full potential.”<sup>98</sup> Digital technology has greased the wheels and drastically reduced transaction costs of digital creations.<sup>99</sup> Matt Mason, author of *The Pirate’s Dilemma*, stated, “[o]n every continent, amateurs are now armed with easily (and sometimes freely) accessible state-of-the-art hardware and software, not to mention the open, global distribution channel that is the Internet. Doing it yourself has never been easier.”<sup>100</sup> This holds true for children, as well as adults. Children today have, for the most part, the same access to computers as adults do and thus the same access to technological tools of innovation. Digital technology enables the ordinary to create something extraordinary.<sup>101</sup> Technology is the means through which ordinary people can create, while the Internet enables them to share that creativity with others.<sup>102</sup> Despite the tremendous potential of edutainment in our classrooms, much of the creative content created by children via digital technology is presumptively a violation of the copyright laws. Thus, our current legal system is discouraging educators, fearful of potential liability, from using edutainment in the classroom. In turn, we are negatively affecting the way our children are learning and processing information. Likewise, we are inhibiting the creativity of our students, something that runs contrary to the basic goals of our Copyright regime. Despite the fact that “this is where education . . . is going” and this is how “students who grow up digital think and want to learn . . . we are building a [legal] system that completely suppresses the natural tendencies of today’s digital students.”<sup>103</sup> The fear is that the incredible potential of today’s generation of children for creativity and innovation will be stifled, rather than nurtured.

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97. Sir Ken Robinson, Lecture for TED: Do Schools Kill Creativity? (Feb. 2006) (video available at [http://www.ted.com/index.php/talks/ken\\_robinson\\_says\\_schools\\_kill\\_creativity.html](http://www.ted.com/index.php/talks/ken_robinson_says_schools_kill_creativity.html)).

98. MASON, *supra* note 7, at 26.

99. LESSIG, THE FUTURE OF IDEAS, *supra* note 94, at 8.

100. MASON, *supra* note 7, at 26.

101. LESSIG, THE FUTURE OF IDEAS, *supra* note 94, at 9.

102. *Id.*

103. *Id.* at 235.

*B. Fair Use and Edutainment*

This section explores whether the fair use doctrine can serve as a justifiable defense to copyright infringement when multimedia is used for educational purposes. Normally, commercial use weighs against a finding of fair use, while nonprofit use is generally found to be a fair use. Entertainment, such as a video game, is generally used for commercial purposes. Educational uses, on the other hand, are generally nonprofit uses, and are thus considered presumptively fair. But courts have made it clear that not every educational use is fair. With these two diverging trends in mind, it is difficult to determine whether edutainment, if ever litigated, would be deemed “fair.”

In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, Nintendo alleged that the plaintiff, creator of Game Genie, an accessory that permitted consumers of the Nintendo Entertainment System (NES) to temporarily alter aspects of their Nintendo games, infringed its copyright.<sup>104</sup> The United States District Court for the Northern District of California held that the Game Genie did not constitute a derivative work, and even if it did, it constituted a fair use, as it was used for personal home enjoyment and not for commercial purposes.<sup>105</sup> The *Nintendo* court focused primarily on the fact that the alleged infringers were personal consumers using the product for noncommercial use in their private homes, similar to the *Sony* case.<sup>106</sup>

In *Encyclopedia Britannica Educational Corp. v. Crooks*,<sup>107</sup> however, the District Court for the Western District Court of New York stated that merely because a use is non-commercial or educational does not “invariably sanction fair use.”<sup>108</sup> The fact that an unauthorized use is for a nonprofit, educational purpose is just

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104. *Nintendo*, 780 F. Supp. 1283, 1286 (N.D.Cal 1991).

105. *Id.* at 1298.

106. *Nintendo*, 780 F.Supp. at 1291. In the *Sony* case, also known as the “Betamax” case, the court held that the copying of entire television programs does not constitute copyright infringement because this kind of “time-shifting” by personal consumers in their homes is considered a fair use. *Sony Corp. of America v. University City Studios, Inc.*, 464 U.S. 417 (1984).

107. *Encyclopedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982).

108. *Id.* at 1174.

one factor to be weighed in the analysis and is not necessarily conclusive of fair use.<sup>109</sup>

In analyzing the Fair Use factors, the first factor to consider is the purpose and character of the use. We know from precedent that not-for-profit, educational uses are usually deemed “fair.” Usually, however, the copyrighted material that is per se infringed by educators but deemed fair tends to be considered face-to-face instruction, and thus covered by one of the exceptions listed in § 110.<sup>110</sup> For example, a teacher who photocopies pages from a textbook and distributes them to her class is technically infringing a copyright, but it is deemed a fair use. Similarly, a teacher who shows a movie in class is probably infringing a copyright; but this, too, would probably be deemed a fair use because the material is being used for the purpose for which it was intended—to entertain and educate.<sup>111</sup> The issue is not so clear, however, when an educator uses multimedia, including television and video games, in her classroom for her children to use as learning tools.

Educators who use forms of entertainment or employ edutainment technologies, in their classrooms, usually have a noncommercial purpose. Moreover, technology that is used to educate, as opposed to that which merely entertains, certainly serves a different purpose and can be viewed as transformative. Teachers should therefore encourage students to create content and use their creativity to transform copyrighted material using the media and digital technology into content with a new purpose or meaning. If students create transformative works, this factor would weigh in favor of fair use, given the nonprofit character of instruction and use in the classroom.

As for the nature of the copyrighted work, most of the copyrighted material used in edutainment is creative in nature. The numbers, mathematical formulas, and facts are generally not copyrightable,<sup>112</sup> but the characters and media references probably

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109. *Id.*

110. 17 U.S.C. § 110.

111. 17 U.S.C. § 110; *see also* Video: The Code of Best Practices in Fair Use for Media Literacy Education, (Am. Univ. Center for Social Media 2008) (available at [http://www.centerforsocialmedia.org/resources/publications/code\\_for\\_media\\_literacy\\_education/](http://www.centerforsocialmedia.org/resources/publications/code_for_media_literacy_education/)).

112. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368-69 (5th Cir.

are protected by copyright.<sup>113</sup> When an educator uses edutainment in the classroom, it is primarily creative content that she is using. This factor, therefore, weighs against a finding of fair use.

In evaluating the amount and substantiality of the portion used, the issue is difficult, if not impossible, to tackle preemptively. This is a highly factual inquiry and different forms of edutainment use different amounts of copyrighted material. Additionally, the quantity is not always the key inquiry, but rather whether the “heart” of the copyrighted work is taken.<sup>114</sup> When students are using the media or popular culture to create content, they are probably interested in the most recognizable aspect of the original work, so even if a small portion of the copyrighted work were taken, it would probably be the “heart” of the work. This factor is unclear, but would probably weigh against a finding of fair use.

As for harm to the potential market for the original, use of copyrighted material in the classroom would probably not supersede the need for the original in the market. This is where educators would have to step in and ensure that the content students create is maintained as not-for-profit, educational material. Children should be encouraged to share their creative content using the Internet, but should not attempt to exploit their work. If the use of copyrighted material remains germane to education, it probably would have no effect on the value of the original. To the contrary, it could enhance the value of the original.<sup>115</sup> This factor, therefore, will probably weigh in favor of

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1981).

Obviously, a fact does not originate with the author of a book describing the fact. Neither does it originate with one who ‘discovers’ the fact . . . Thus, since facts do not owe their origin to any individual, they may not be copyrighted and are part of the public domain available to every person.

*Id.* But see Feist, 499 U.S. at 348-50 (explaining that a factual compilation can be copyrightable even if it “contains absolutely no protectable written expression” and consists of only facts “if it features an original selection or arrangement”).

113. Characters that are highly delineated are generally copyrightable. See generally *Anderson v. Stallone*, 11 U.S.P.Q.2d (BNA) 1161 (C.D. Cal. 1989); see also *Warner Bros. Inc. v. American Broad Co.*, 720 F.2d 231 (2d Cir. 1983).

114. See *supra* notes 51-52 and accompanying text.

115. See *Video: You Can Vote However You Like* (Ron Clark Acad. 2008), available at <http://www.youtube.com/watch?v=UxlwYP0HNdc>. This video is

fair use if proper safeguards are put in place.

#### IV. ADDITIONAL AVENUES OF PROTECTION

Educators have additional safeguards in §110, which provides for exemptions of certain types of performances and displays from a copyright owner's exclusive rights.<sup>116</sup> One such exemption is for the "performance or display of work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution . . . ."<sup>117</sup> This exception applies to texts, as well as audiovisual and digital material that is used to convey information and applies when a teacher uses the content for the same purpose for which it was intended—to instruct or entertain.<sup>118</sup> Another exemption is for use of copyrighted material for instructional use, but in a distance education form such as online classrooms.<sup>119</sup> The Institute for Media Literacy Education refers to this as the use of media in education, *not* media literacy education.<sup>120</sup>

When content is used for the same purpose for which it was originally intended, it has not been transformed. Often such content has been licensed or was intended to instruct and entertain, and is therefore being used for the same purpose for which it was intended.<sup>121</sup> Such use of media in education often will not have significant copyright implications, whereas media literacy education enters uncharted territory.<sup>122</sup> Section 110 does not cover transformative uses of copyrighted material using technology and

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an example of how children can affect the media more than the media affects them. The children's use of a top billboard rap song to employ what they learned in debate class and demonstrate their creativity only popularized the song more; it certainly did not supersede or suppress the demand for the original. See JustThink.org, *Featured Video: You can vote however you like*, <http://www.justthink.org/media-resources/ron-clark-academy-students-use-hip-hop-to-get-out-the-vote> (last visited Feb. 28, 2010).

116. 17 U.S.C. § 110(1).

117. *Id.*

118. Video: The Code of Best Practices in Fair Use for Media Literacy Education, *supra* note 111.

119. 17 U.S.C. § 110(2).

120. Video: The Code of Best Practices in Fair Use for Media Literacy Education, *supra* note 111.

121. *Id.*

122. *Id.*

media in the classroom.<sup>123</sup> Therefore, it does not do enough for educators. As Peter Jaszi, Professor at American University, stated, “The specific exceptions that copyright law provides for teaching are too few and too narrow to cover many common and important educational practices.”<sup>124</sup>

When the Copyright Act of 1976 was enacted, legislators refused to create a specific exemption for reproducing copyrighted works for use in the classroom, but did recognize the “need for greater certainty and protection for teachers.”<sup>125</sup> In response, an Ad Hoc Committee comprised of representatives from educational institutions and organizations submitted suggested guidelines for classroom copying of copyrighted material to the House Committee.<sup>126</sup> The House Committee incorporated the guidelines, which are merely guiding principles and not law, but nevertheless have become the accepted standard in higher education.<sup>127</sup> These guidelines generally provide that a teacher may make a single copy of copyrighted material for preparation and scholarly research, and multiple copies—one per pupil—for classroom instruction if certain criteria are met.<sup>128</sup> The House Committee also amended 504(c) to provide teachers with “broad insulation against unwarranted liability for infringement.”<sup>129</sup>

Another option for educators is to utilize the Creative Commons,<sup>130</sup> a nonprofit organization dedicated to making available a body of creative content to the public for free to use, share, and transform.<sup>131</sup> The Creative Commons gives content

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123. *Id.*

124. *Id.*

125. H.R. Rep. No. 94-1476, 66-67 (1976).

126. UCLA School of Law Copyright Policy, Hugh & Hazel Darling Law Library, <http://libguides.law.ucla.edu/content.php?pid=18834&sid=139096> (last visited Fe. 28, 2010).

127. *Id.*

128. *Id.* These criteria include brevity, spontaneity, the cumulative effect test, and each copy must contain a notice of copyright.

129. *Id.* Section 504(c) provides that a court shall remit statutory damages where an alleged infringer reasonably believed her use was a fair use, provided the person was an employee of a nonprofit educational institution.

130. What is CC?, CREATIVECOMMONS.ORG, <http://creativecommons.org/about/what-is-cc> (last visited Feb. 28, 2010).

131. *Id.*

creators the choice to surrender all of their rights in their work to the public domain—a “no rights reserved” license—or to choose those rights they wish to retain and those they are willing to give up—a “some rights reserved” license.<sup>132</sup> A Creative Commons license does not strip a person of her copyright; rather, it allows a copyright holder to put her work into the public domain and advise the public what they can and cannot do with her work.<sup>133</sup> Thus, educators have some options and protection in the form of proposed safeguards, but much more can and should be done to adequately protect educators and ensure the creation and dissemination of creative content.

## V. THE PRESENT AND FUTURE OF EDUTAINMENT

Fearing that the fair use defense might not always be enough, educators and educational associations are starting to take action. On November 11, 2008, more than 150 members of leading educational associations, as well as educators from across the country, developed The Code of Best Practices in Fair Use for Media Literacy Education.<sup>134</sup> Once created, a committee of legal scholars and lawyers with expertise in copyright law reviewed it.<sup>135</sup> The Code is intended to advise educators of media literacy concepts and techniques and assist them in understanding their rights and defenses to use such concepts and techniques pursuant to the doctrine of fair use.<sup>136</sup> The Code explains the concept of media literacy:

Media literacy is the capacity to access, analyze, evaluate, and communicate messages in a wide variety of forms. This expanded conceptualization of literacy responds to the demands of cultural

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132. *Id.*

133. *Id.*

134. ACTION COALITION FOR MEDIA EDUCATION, ET AL., THE CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION (2008) *available at* [http://www.centerforsocialmedia.org/files/pdf/Media\\_literacy.pdf](http://www.centerforsocialmedia.org/files/pdf/Media_literacy.pdf) (hereinafter *The Code*).

135. *Id.* at 2, 18-19.

136. *Id.* at 1.

participation in the twenty-first century. Like literacy in general, media literacy includes both receptive and productive dimensions, encompassing critical analysis and communication skills, particularly in relationship to mass media, popular culture, and digital media.<sup>137</sup>

The Code identifies five principles that represent acceptable practices for the use of copyrighted material in the classroom, as well as suggested limitations on those principles.<sup>138</sup> First, the Code recommends that copyrighted material be used in media literacy lessons; this entails the use of news, advertising, movies, images, articles, web sites, video games, and other copyrighted material in critical-thinking and communication activities.<sup>139</sup> The limitation on this principle is that “[e]ducators should choose material that is germane to the project or topic, using only what is necessary for the educational goal or purpose for which it is being made.”<sup>140</sup> Additionally, educators should provide and encourage proper citation where appropriate, as well as provide reasonable protection against third-party access where material is made available in digital format.<sup>141</sup>

Secondly, the Code recommends that educators utilize copyrighted material in preparing curriculum materials, which entails using copyrighted material, such as samples of mass media and popular culture, in creating lesson plans and curricula.<sup>142</sup> The limitation on this principle is very similar to that of the first principle, but the materials used in the curricula should meet professional standards and have a clear educational objective.<sup>143</sup>

Third, the Code recommends that educators share media literacy curriculum materials, which entails both formal and informal sharing of these materials—including lesson plans and resources—

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137. *Id.* at 2.

138. *Id.* at 9-14.

139. *Id.* at 10.

140. *The Code*, *supra* note 134, at 10.

141. *Id.* at 11.

142. *Id.*

143. *Id.*



with other educators.<sup>144</sup> The limitation on this principle is similar to the limitations for the other principles, but the Code also states that “[c]urriculum developers should not rely on fair use when using copyrighted third-party images or texts to promote their materials,” and should follow the “permissions process.”<sup>145</sup>

The Code also encourages students to use copyrighted materials in their own academic and creative work, either by incorporating or modifying copyrighted media objects in their work.<sup>146</sup> The limitation here is that “[s]tudents’ use of copyrighted material should not be a substitute for creative effort.”<sup>147</sup> In other words, students should not just simply depend on the copyrighted material; instead, educators should encourage students to create transformative works.

Finally, the Code directs educators to develop audiences for student work and distribute it accordingly.<sup>148</sup> If a student’s work is transformative, it should be able to be distributed to wide audiences under the doctrine of fair use.<sup>149</sup> The Code suggests, however, that educators should distinguish between material that should be licensed, that which is in the public domain, and that which is probably “fair” to use anyway. Moreover, they should make every effort to inform students that proper attribution should be provided where possible.<sup>150</sup>

While this Code is a great start and has good ideas for educators to consider, it does not do enough to protect educators. Although the Code suggests that fair use is in fact a reliable defense that should be boldly asserted by educators, it is nonetheless difficult to instruct anyone on the ins and outs of the fair use doctrine because of its subjective and amorphous nature. Furthermore, in practice, educators are unlikely to use the fair use doctrine as a sword but merely as a shield, if they are not ensured that their practices in the classroom will be considered fair uses. Peter Jaszi, who is one of the primary coordinators of the Code of Best Practices in Fair Use

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144. *Id.* at 11-12.

145. *Id.* at 12.

146. *The Code*, *supra* note 134, at 12.

147. *Id.* at 13.

148. *Id.*

149. *Id.*

150. *Id.* at 13-14.

for Media Literacy Education, even stated that “[t]he so-called fair use guidelines on topics like photocopying and off-air taping are rigid, conservative, outmoded interpretations of the law, not the law itself. They no longer reflect the realities of the classroom, if they ever did.”<sup>151</sup> In reality, these guidelines are strangling, rather than enabling, educational practice.<sup>152</sup>

Because of these concerns, there is a culture of fear in the classroom; educators are admittedly unsure of what they are, and are not, permitted to do and use inside the classroom.<sup>153</sup> Many educators miss the opportunity to use copyrighted material to enhance the learning experience “because they don’t know their rights under fair use, have been given bad information or lack administrators who will back them up.”<sup>154</sup> A report by American and Temple universities reported that many teachers are censoring themselves.<sup>155</sup> Professor Renee Hobbs at Temple University, who collaborated on the Code of Best Practices in Fair Use for Media Literacy Education, reported that “[t]he first question out of teachers’ mouths these days is, ‘Will I get in trouble?’”<sup>156</sup> Getting sued is one of the biggest fears educators have concerning the use of copyrighted material in the classroom.<sup>157</sup> And because teachers often misunderstand the law and their defenses and other safeguards, they engage in self-censorship in the classroom.<sup>158</sup> As Dr. Hobbs notes, this does a “huge disservice” to students because “to be a citizen you have to be able to comment on and analyze what’s going on in newspapers, in advertising, on film, [and] on local TV news.”<sup>159</sup> Additionally, since educators are so fearful, students are taught to believe that what they are learning or what they are doing, is wrong. Many educators who use copyrighted

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151. Video: The Code of Best Practices in Fair Use for Media Literacy Education, *supra* note 111.

152. *Id.*

153. *Id.*

154. Eleanor Chute, *Copyright Code Developed to Guide Teachers*, POST GAZETTE, Nov. 10, 2008, available at <http://post-gazette.com/pg/08315/926769-298.stm>.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

material in the classroom close the door, which sends students the wrong message.<sup>160</sup> This culture of fear can only be dispelled with stronger assurances upon which educators can rely, such that educators will be encouraged to use copyrighted material and media in the classroom to promote and facilitate students' creative work.

The best option would be for Congress to amend the statute. Section 110 provides educators a level of protection, but the current format of § 110 does not adequately provide for digital media and technology that is so prevalent in popular culture. Furthermore, relying on Congress to make legislative changes is not sufficient either, as such changes would likely take a long time to come into effect if they were to come to fruition at all.

To that end, this article proposes that programs be developed for teachers to educate them about digital technology/media that exists today and to provide them with guidance as to what they can and cannot do in the classroom. While some young teachers just out of school may have some knowledge about technology and digital media, many older teachers or those who have been out of school for a long period of time, may not be as privy to such information. Because children are learning and processing information digitally today, educators should be employing such media tools in the classroom. To do so, they necessarily must be familiar with the technology and material themselves.

In addition, while the Code of Best Practices in Fair Use for Media Literacy Education has some useful guidelines for educators, it is not mandatory for them to obtain or employ. Teachers should have to attend mandatory programs, similar to CLE courses for lawyers,<sup>161</sup> where they will not only learn and use digital technology/media and the media to create lesson plans and curricula, but will also learn about copyright law and defenses like fair use and the exemptions found in § 110, which they may be

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160. Chute, *supra* note 154.

161. CLE stands for Continuing Legal Education, and although it varies by jurisdiction, most lawyers are responsible for attending CLE programs and obtaining a certain number of CLE credits in order to maintain their professional degrees. *See generally*, Minimum Continuing Legal Education (MCLE) Board of the Supreme Court of Illinois, <http://www.mcleboard.org> (last visited Feb. 28, 2010).

able to rely on for protection. They will also learn that the content that students create and distribute can, and should, be shared on the Internet, so long as the work is not used for commercial purposes and serves merely as a way for students to express themselves creatively and share their content with the world. In the fair use context, educators will learn the boundaries of what they can and cannot do. In particular, they will learn the importance of ensuring that the copyrighted material is used in a transformative way and that students use and remix the material in a way such that it will serve a new and different purpose, so that it educates and not merely entertains.

## VI. CONCLUSION

In today's "read-write" culture,<sup>162</sup> children have the tools and technology to be content creators, but the current copyright law regime is ill-equipped to foster and protect their creative tendencies. Edutainment has the potential to open new and exciting creative learning platforms for educators and children alike, but this potential will not be recognized if educators are reluctant to use edutainment in the classroom. It is unclear how edutainment will fare in the fair use analysis, but nonetheless, educators need additional safeguards and assurances beyond fair use and § 110 exemptions in order to use edutainment and digital technology in the classroom without fear of infringement. If children are permitted to unleash their creative tendencies in the classroom, the learning process would be enjoyable and they would likely absorb more information. After all, what better way to take your vitamins than in a sweet cupcake?<sup>163</sup>

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162. LESSIG, *FREE CULTURE*, *supra* note 4, at 37.

163. *See supra*, note 67 and accompanying text.

